

It Takes More Than a Tool To Ensure Fairness

A Snapshot of Ability-to-Pay Tools for Fines and Fees

The campaign to curtail or end the use of fines and fees in the criminal legal system has yet to coalesce into a commonly-used hashtag. The issue of fines and fees involves a complicated web of state statutes, local budgets, and the practices of individual court systems. The topic also triggers a complex debate around accountability and feasibility. For some, fines are a way of holding people accountable for certain criminal offenses. And others maintain that, given the important revenue source they represent for many jurisdictions, doing away with fines is unrealistic. Yet both claims elide prior, urgent questions: who is being held “accountable” and at what cost are they being made to fund the very system purporting to do so?

Legal financial obligations (LFOs) disproportionately punish people who are poor and financially insecure. It can lead to long-term economic hardship and debt. Due to its reliance on enforcement measures, such as warrants and arrests for non-payment, it also increases a person’s risk for future contact with the criminal legal system. “Accountability,” then, can look very different for people who can pay upfront versus those who cannot.

Jurisdictions around the country have been taking steps to address these inequities—such as more accessible payment plans, alternatives to fines and fees, and the elimination of administrative fees. While many jurisdictions are on track to abolish fees, fines will likely remain with us for the foreseeable future. As such, ability-to-pay assessment tools are one example of the steps being taken to reduce the disproportionate harm that fines have on people who are unable to pay. But are they enough?

This brief takes a practical approach to introducing the basics of ability-to-pay tools—what we know and what’s left to learn. We offer guidance on what could make for a better tool that is efficient, accurate, systematic, and effective. Given the stakes we’ve outlined above, our conclusion is not surprising: while helpful, these tools are not sufficient on their own to ensure fairness. We make the case that tools must be part of a larger tool-set or comprehensive menu of policy, practice, and system-wide reforms. And any effort to move toward equity and away from a two-tiered system that criminalizes poverty must also contend with our deeply-rooted ideologies underlying notions of “accountability.”

Fines and Fees: A Basic Breakdown

LFOs—also referred to as “criminal debt” or “fines and fees”—are often used as sanctions for people charged with an offense, regardless of the legal outcome (e.g., found guilty, dismissed, etc.). Over the past several decades, as the push to reduce incarceration has grown, states and court jurisdictions have expanded their use of LFOs for civil, misdemeanor, and felony convictions, as well as in bail-setting. States have added new monetary sanctions to their penal codes or have increased fine amounts—raising conflict of interest concerns as some of these revenue streams have been used to cover court budget line items.¹

Although LFOs are regarded as less punitive than incarceration, their use within the criminal

legal system has significant and disproportionate consequences for low-income people and communities of color. Over time, people who are indigent and unable to pay their financial obligations can incur additional charges through court fees, high interest rates, and surcharges. Often unrelated to the original monetary sanction, these additional charges can exceed the original amount, and are applied regardless of an individual's conviction status. For example, across different jurisdictions, people are charged fees for a public defender, probation supervision, electronic monitoring, substance and alcohol-use treatment, and even for their trials.²

Ultimately, LFOs can lead to spiraling debt burdens that result in people becoming entangled in the criminal legal system for years.³ People who fail to pay fines and fees, regardless of their intent or ability, can experience wage garnishment, driver's license suspensions, removal of voting rights, or even jail.⁴

Assessing Ability-to-Pay

Determinations of people's ability to pay LFOs are often not standardized, do not proactively assess all defendants, and rest with select court actors such as court administrators and judges. Concerns over the adverse impact of LFOs, along with legal challenges in certain jurisdictions, have led communities across the country to review their practices. Such reviews have resulted in a continuum of strategies ranging from the abolishment of certain fees⁵ to the use of assessment tools such as affidavits, bench cards, and calculators. These assessment tools have been used as a way to assist courts in making ability-to-pay (ATP) determinations, such as by offering guidance to judges and court staff on whether to impose lower LFO amounts or to waive debts. Despite this momentum, ability-to-pay tools are still new, and we have yet to fully understand the range of existing tools, how they are being implemented, and what impact they're having.

Toward this end, we conducted five interviews with judges and court administrators across five states. The interviews were designed to understand each jurisdiction's tool and how it was implemented, including common factors

that have challenged or facilitated their use. Our review considers three types of ability-to-pay tools: affidavits, bench cards, and calculators. First, we provide a brief snapshot of these tools and some of the characteristics to consider when developing a tool. We then describe the infrastructure that needs to be put into place for these tools to be successfully implemented and brought to scale. We end with future directions for practitioners, policy-makers, and researchers who, in the absence of the elimination of user-funded systems, want to explore whether and how ability-to-pay tools can foster a fairer system.

Ability-to-Pay Tools: A Snapshot from the Field

Affidavits

Affidavits are the most basic of the three ability-to-pay tools under consideration. As part of determining ability-to-pay, these affidavits may ask for specific financial information to be completed.

Montgomery County, AL, has people complete an Affidavit of Substantial Hardship at arraignment—either on their own or they can receive assistance from the public defender's office. The Affidavit is brief and relies on a person's self-reported information to determine indigency (125% of the federal poverty level [FPL]), such as monthly income, expenses, assets, and government assistance benefits (e.g., Medicaid, food stamps).

While the affidavit can be helpful as an initial guide, one Montgomery County judge explained to us that, at a judge's discretion, the tool may also be accompanied by examining the person under oath, which provides for open discussion. Some people do not fully understand the language contained in the form or do not correctly complete the asset portion of the form. Sometimes people indicate that they experience financial hardship on the affidavit, but also declare assets such as owning a home. While seemingly contradictory, many are over-burdened by their mortgage payments—but this only emerges when a judge has a dialogue with the person being charged/convicted. In some instances, people who are financially pressed prioritize paying their

finances, but then fail to comply with rehabilitation requirements. The judge we spoke to prioritizes rehabilitation and directs people to first pay for their classes (e.g., substance abuse treatment, anger management) as needed. Indigent waivers are also available for these classes. Sometimes fines are adjusted through the development of a payment plan. However, engaging people in further discussion to better understand their financial circumstances is at the discretion of the judge.

Harris County, TX, has developed a financial affidavit as a self-reporting tool that is used by the court in making an indigency finding for Class A and Class B misdemeanors. A judicial officer makes a determination on bail based on various factors (e.g., likelihood of making a court appearance, public safety concerns), one of which is a person's ability to pay. The affidavit is completed within 48 hours of arrest, with the help of pretrial services, and collects information such as income, government assistance, expenses, and assets. Information collected in the affidavit is then entered into a system and an algorithm uses the financial information to flag individuals who fall below 125% of the FPL. A report of individuals who fall below this threshold is then made available the next business day before a person's first appearance in court (if they were not already released).

Bench Cards

A bench card functions as a brief and accessible document that provides judges with a quick reference to steps that should be taken to determine a person's ability to pay LFOs.

Mecklenburg County, N.C., uses two fines and fees bench cards, for traffic and misdemeanor cases. The first bench card provides guidance on the initial decision of whether a person being charged/convicted should incur fines, fees, costs, or restitution.⁶ It begins with guiding principles (e.g., "excessive LFOs may serve as a barrier to reentry") and reminds judges of their role, responsibilities, and discretion when determining ability to pay. For example, judges have the authority to waive, remit, or reduce financial obligations. As specified in the bench card, individuals meeting any of the following criteria

are presumed unable to pay or unable to pay in full: eligibility for an appointed counsel; below 200% of the poverty guidelines; full time student; homeless; incarcerated or residing in a mental health/substance abuse program in the past six months; or receiving public assistance. Additionally, the courts can use the following factors to set LFO amounts: resources (e.g., debts, assets); ability to earn (e.g., employment history, educational attainment); and dependents (e.g., child support, elderly dependents). The general guidance for a monthly LFO payment amount is 10% of net monthly income after basic living expenses. The bench card also specifies that the court can consider waiving costs and fees and can provide alternatives when people cannot pay (e.g., community service).

The second bench card is used when a person has failed to pay and delineates specific steps to deal with collection.⁷ For example, at least three reminders may be sent before a hearing, the court can issue a show cause hearing, or convert to civil lien (which carries an 8% interest rate and is reported to credit agencies). Prior to these bench cards being used, a person's financial circumstances were typically presented by their attorney at sentencing.

Ability-to-Pay Calculators

Some jurisdictions use calculators, which typically have built-in capability—such as a database or algorithm—to generate calculations or search through statutes. Calculators are typically computer or web-based platforms.

California. As part of a pilot project, some court jurisdictions in California use an online ability-to-pay calculator for traffic citations,⁸ which was developed with the help of start-up funds from a federal grant.⁹ When the court sends an appearance date reminder, the notice may provide the option for people to make an ability-to-pay request online. The calculator has a user-friendly platform to request a review. Given that California has a high volume of traffic cases, the tool has the parallel benefit of streamlining court processes, since an online ability-to-pay request is considered a court appearance (i.e., a litigant is pleading guilty or no contest). In other words, litigants do not need to show up to court unless they want to contest their case.

The online calculator prompts the litigant to enter demographic and financial information, with an option to upload supporting documentation. For example, the program allows litigants to take a picture of a Cal-Fresh card and submit it for proof of public benefits status.¹⁰ When making a request, a person can then select one or more options such as a reduction of payment amount (the most common choice), a payment plan, expanded time to pay, or community service. Once all of the information is submitted, litigants are informed of the court’s decision within about 30 days. Individuals receiving public assistance typically receive a reduction. Different court jurisdictions have their own thresholds for deductions, which can vary from 100% to up to 500% of the FPL where the cost of living is significantly higher (e.g., Santa Clara and San Francisco).

Washington State judges have had access to a publicly available LFO calculator since 2018.¹¹ The calculator is a database of criminal charges and their applicable LFOs that helps users (e.g., attorneys, judges, defendants) navigate complex statutes and options. The calculator 1) reminds judges what must be considered in determining if defendants are indigent; 2) identifies what LFOs are prohibited by law because of indigency; 3) identifies what LFOs are mandatory and which ones may be reduced or waived. The calculator can also determine whether a proposed payment plan is realistic or risks turning a sentence into an unintended long-term debt.

What Makes for a Good Tool?

While we cannot conclusively state that one ability-to-pay tool is preferable to another, several considerations should be noted. Overall, a “good tool” should be efficient, accurate, systematic, and effective.

Efficient: Courts can experience a high volume of cases, and ability-to-pay tools need to produce results in a reasonable amount of time to avoid creating delays in case processing. Financial affidavits are relatively short and can be completed rapidly. Online calculators can also be efficient, especially if completed remotely. The jurisdictions we spoke with typically relied on self-reported

financial information, which serves as an efficient information source. By comparison, requiring external validation of income and expenses—such as requiring proof of income and expenses—can cause delays or lead to dismissing people that would otherwise qualify as indigent simply because paperwork could not be produced.

Accurate: Tools should rely on information that accurately determines indigency or ability to pay. In general, jurisdictions tend to use federal poverty guidelines (e.g., 125% of the FPL) to generate indigency determinations, though these thresholds are generally a guide and can vary. Across the jurisdictions we spoke with, eligibility for government assistance (e.g., Medicaid, TANF) was viewed as an acceptable proxy for indigence. If someone receives government assistance, it may not be necessary to further probe their financial information. That is, a more elaborate or detailed classification system to determine indigency may not be necessary as the receipt of benefits alone can result in a waiver—and in fact, some research suggests that self-reported income is generally accurate.¹²

Systematic: The implementation of ability-to-pay tools is sometimes inconsistent. Judges, or other court staff, use the tools to varying degrees—if the tool is even used at all. Bench cards can help strengthen protocols by listing the specific steps to determine a person’s ability to pay. Systemizing these processes can help to ensure accuracy by minimizing bias and inconsistencies in ability-to-pay practices.

Effective: In order to be effective, tools should minimize financial burdens and offer a range of alternative solutions or payment options such as payment reductions, expanded time, payment plans, and community service.¹³ The effectiveness of any tool will be limited if court actors are unaware of the LFOs that statutorily qualify to be waived. Given complex penal codes in which court staff must navigate which LFOs can be modified (e.g., fines, fees, costs, assessments) and for which charges, court staff will need to have relatively easy access to this information.

In addition to the four principles listed above, there can be at times a lack of conceptual clarity concerning these tools. For example, several financial affidavits used to determine indigency appear to function as an assessment tool rather than a simple declaration of indigency. At times, these tools overlap in terms of design or functionality. In Harris County, information from the financial affidavit is entered into a system and an algorithm then uses the information to flag individuals who appear to be indigent—in this respect functioning as more of a calculator. Notably, many tools are not prescriptive in their recommendations and do not rely on a specific scoring or classification system, which may be at odds with what some may deem to be an effective assessment tool.

Necessary, but Not Sufficient?

Our discussions with jurisdictions have made it clear that ability-to-pay tools are not, on their own, a sufficient guarantee of fairness. The effectiveness of these tools also depends on how they are implemented and the broader infrastructure

supporting their implementation, including leadership, resources (e.g., funding, staff, time), the normative beliefs and culture of the court setting, and policies and protocols. This framework is represented below in combination with the principles described above.

Leadership support and beliefs systems. Changing court practices and implementing reforms often hinge on the directives of court leaders. In jurisdictions we interviewed, wide implementation of ability-to-pay tools was often spearheaded by a Chief Judge (or judges) who believed that monetary sanctions warrant a careful assessment. Yet, in some jurisdictions, the tools may have mixed support, which can result in a fragmented implementation of the tool. The endorsement or acceptance of these tools is often rooted in underlying belief systems or court culture. Some of the people we spoke with pointed out that some judges favor tangible sanctions that were viewed as holding people accountable. For these judges, waiving fees was described as tantamount to “letting defendants off with no consequences.” Ability-to-pay tools often rely on self-reported income information; their



accuracy may be questioned if people charged with an offense are generally viewed as “dishonest” or “manipulative.” Any effort to bring these tools to scale to advance fairness in the court system and the disproportionate impact of LFOs on people who are low-income will need to contend with deeply-rooted beliefs about accountability and punishment.

Policies and protocols. Ability-to-pay tools are only as effective as local and state policies concerning fines and fees. The tools are generally designed to help assess indigency and the accompanying sanctions that can be waived. They cannot undo draconian LFO policies. Despite an increase in the use of LFOs, some states are enacting legislation to help courts inquire about people’s financial means and expand alternatives to payment.¹⁴ Yet, legislation can be disregarded and doesn’t necessarily guarantee a change in practice. As an example, New York State’s recent bail reform¹⁵ requires courts to consider an individual’s ability to pay when setting bail and offer alternatives and more accessible bail options. However, the statute does not require the use of a tool or assessment to help inform the court’s decision. Despite the Vera Institute of Justice’s development and pilot of a bail calculator¹⁶ in two counties in NYC, the initiative was not taken to scale. And even with specific legislation in place requiring a change in practice, bail payments in NYC only “slightly decreased in 2020 (landing at 15% at arraignment and 49% after 90 days).”¹⁷

New York is hardly alone in enacting policies that are not always fully implemented. Despite statutory protections in Oklahoma, courts have failed to implement them (e.g., requisite notice, hearing) before imprisoning individuals because of their failure to pay.¹⁸ Legislation may need to be supplemented with court policies and protocols to ensure they are consistently applied. Clearly, any comprehensive effort to bring these tools to scale and create a more just system will require broader policy changes.

Resources. Implementing and sustaining ability-to-pay tools requires resources. Developing these tools costs money, especially if the tool, such as a calculator, uses online capabilities and databases. Some of the jurisdictions we interviewed received

grant funding to develop their tools. Even once a tool is developed, court personnel require training and are often called upon to assist with completing assessments. This can mean hiring new staff or adding new tasks to existing personnel. As many courts are short of resources, some jurisdictions may hesitate to employ ability-to-pay tools if LFOs are viewed as a necessary revenue stream. However, the evidence is not conclusive as to whether LFOs do in fact generate a viable revenue stream.¹⁹ Indeed, ability-to-pay tools may even produce cost-saving benefits if they can help streamline case processing or reduce incarceration.

Future Directions For Practitioners, Policymakers, and Researchers

Ability-to-pay tools are still in their infancy and several considerations are necessary to move the field forward and, as we have outlined above, practitioners should prioritize the use of tools that are efficient, accurate, systematized, and effective. Toward this end, a brief financial affidavit or calculator that is completed remotely can serve as a quick and efficient option. Jurisdictions can also streamline these tools by avoiding some supplemental questions when someone has already indicated receipt of government assistance. Further, while collecting a wide range of information may offer a more accurate financial picture, receipt of government benefits and federal poverty guidelines appear to be generally accurate proxies for determining indigency. Recognizing that individuals in higher-income brackets can also experience financial hardship, perhaps more detailed financial information can be reserved for these individuals. Finally, jurisdictions should strongly consider instituting a systematic process for implementing ability-to-pay practices and using the information contained in any tool—the use of a bench card is one strategy that can move jurisdictions in this direction.

More broadly, attention should be shifted away from tools in isolation and toward tool-sets; that is, toward a more comprehensive menu of practices and systems needed to ensure that monetary sanctions are applied fairly. This will require a concerted

effort to engage court leaders; train court staff; build consensus among court stakeholders given the latter’s different priorities (e.g., accountability, feasibility, fairness); change policies and legislation; and invest in resources. Statutes supporting monetary sanctions will need to be carefully reviewed and, where necessary, amended to ensure judges can have more discretion on the types of LFOs that can be waived. Court policies and protocols that delineate when, how, and who administers these tools within court settings will need to be developed. Such policies can require more oversight to ensure the tools are used consistently in all cases. Resource investments in the form of funding, staffing, and training are also necessary. Finally, any effort to create an equitable system that is responsive to indigency will need to contend with deeply-rooted ideologies underlying notions of “accountability” that often sustain the use of punitive monetary sanctions.

There is also a clear need for more research. Ability-to-pay tools need to be evaluated, through process and impact evaluations. Process evaluations can help us to better understand if the tools are being implemented as intended. Impact evaluations can examine how the tools are affecting outcomes, such as compliance. The tools should also be reviewed to determine how they specifically impact vulnerable populations (e.g., low-income, communities of color). Given that courts currently rely on LFOs as a funding source, cost-benefit analyses are also needed to assess the tools’ monetary impact on courts.

The use of LFOs has expanded over the past several decades as states have added new monetary sanctions to their penal codes and have increased fine amounts. Any effort that regards ability-to-pay tools as the “answer” to decades of practices that have sustained a two-tiered legal system will likely only address symptoms, not systems. If the goal is to create a fair, equitable legal system, reforms should work to improve the quality of these tools while simultaneously addressing broader systems that impact their implementation and fairness within the criminal legal system. This broader approach will have to include increasing public support for ending the criminalization of poverty altogether.

NOTES

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